

JUL 27 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

NATIONAL PAINT & COATINGS
ASSOCIATION, INC.,

Petitioner - Appellee,

v.

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT
(SCAQMD),

Respondent - Appellant.

No. 04-56241

D.C. No. CV-04-02213-DDP

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted May 4, 2006
Pasadena, California

Before: HAWKINS and PAEZ, Circuit Judges, and WAKE^{**}, District Judge.

South Coast Air Quality Management District (“SCAQMD”) appeals the
district court’s order remanding to state court a civil action brought against it by

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

^{**} The Honorable Neil V. Wake, United States District Judge for the
District of Arizona, sitting by designation.

National Paint and Coatings Association, Inc. (“NPCA”). SCAQMD removed the case on the basis of diversity and federal officer removal jurisdiction, 28 U.S.C. §§ 1441(a) and 1442(a). Although NPCA’s motion to remand was untimely, the district court remanded the case on the grounds that (i) it lacked diversity jurisdiction because SCAQMD, a citizen of the forum state, violated the forum defendant rule contained in 28 U.S.C. § 1441(b), which constitutes a non-waivable jurisdictional defect; and (ii) it lacked federal officer removal jurisdiction because SCAQMD is not a “person” within the meaning of 28 U.S.C. § 1442(a)(1). SCAQMD disputes both rulings.

Concurrent with the filing of this memorandum, we filed an opinion in *Lively v. Wild Oats Market, Inc.*, No. 04-56682, which disposes of the forum defendant rule issue in this case. In *Lively*, we held that the forum defendant rule is procedural, or non-jurisdictional, and thus a violation of this rule is a waivable defect subject to the 30-day time limit of 28 U.S.C. § 1447(c). Accordingly, the district court in the present case erred in remanding the case to state court because NPCA failed to move to remand the case within the 30-day time limit of § 1447(c).

As the parties conceded at oral argument, if the forum defendant rule is procedural, we must vacate the remand order, regardless of the existence *vel non* of

federal officer removal jurisdiction. Thus, in light of *Lively*, we need not address the federal officer removal issue.

For the reasons articulated in *Lively*, we vacate the district court's remand order and remand for further proceedings consistent with this disposition.

ORDER VACATED and REMANDED.